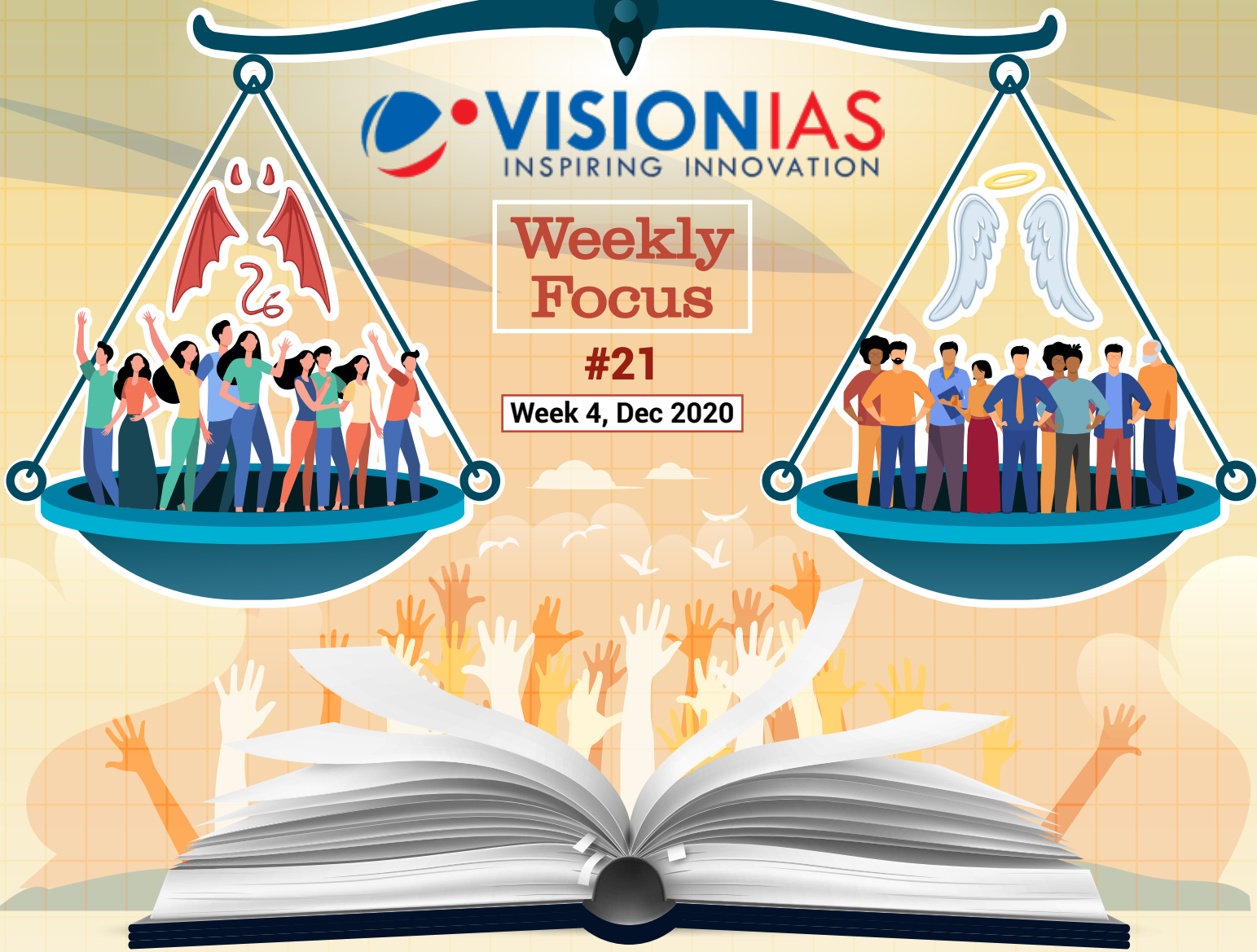


**Weekly  
Focus**

**#21**

**Week 4, Dec 2020**



# CONSTITUTIONAL MORALITY

## Introduction

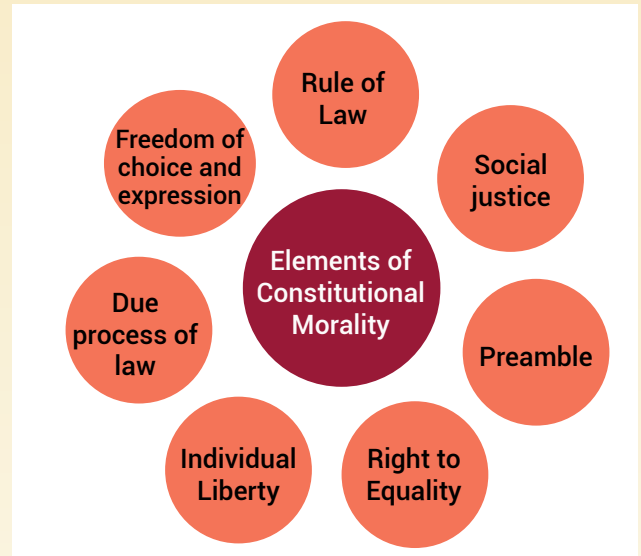
The judiciary as an interpreter of constitution has effectively used the principle of constitutional morality to overcome age old laws, which need to get reformed with changing time and evolution of the society. The Court has applied different facets of this progressive and transformative doctrine, in a number of cases some of which may possibly be counted as the finest and seminal judgments.

However, at the same time, many claim that the application of this doctrine amounts to judicial overreach and is thereby pitting "constitutional morality" against "societal/popular morality". The doctrine came in for heavy criticism after the Supreme Court's Sabarimala judgment and became the subject matter of discussion especially after the Attorney General of India criticized application of Constitutional Morality doctrine as a "dangerous weapon". Following this, the task of defining 'Constitutional Morality' has been referred to a bench of seven judges of the Supreme Court.

Against this backdrop, it becomes crucial to understand what is meant by the term 'Constitutional Morality' and what is the significance of this doctrine in the present times, how the concept evolved over the period of time and how is it interpreted by the Courts, what are the grounds on which the application of this doctrine is being criticised and what principles should guide our approach towards constitutional morality in the future. Through this document, we will attempt to answer these questions.

# What is Constitutional Morality and what significance does it hold?

- The constitutional morality (CM) is **not defined anywhere**, however, there are **many different notions on the same**.
- It basically means **adherence to the core principles of the constitution in a democracy** i.e. a moral obligation of an individual to **uphold the constitutional values with utmost dignity** without any compromise and being faithful towards it.
- It thus **goes beyond the literal interpretation** of the text of the constitution and **dwells into the spirit of the constitution** in which both individual and collective interests of the society are satisfied.
- This doctrine is **still in its nascent stage in India** and has been **evolving over the period of time**. In the recent times, the doctrine has **often been invoked by Supreme Court** in India for striking down laws which could be termed as manifestations of popular morality and in the process, has **acquired new meanings and interpretations**.
- **Significance of the doctrine:-**



- **Safeguards and upholds the enforcement of rule of law in the country:** CM basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflecting an action in an arbitrary manner. As the doctrine tends to question both the citizens as well as the government, it promotes people to be an active participant of the system and fight the inequalities and non-constitutional elements.
- **Promoting and reinforcing the democratic ideals of the nation:** The doctrine promotes congenial cooperation and coordination of all the stakeholders, especially among citizens and the state, to pursue constitutional ambitions. Thus, it points to the idea of propagating the trust of the people on democratic institutions
  - Moreover, since the concept places an obligation on the part of State authorities to conduct themselves in accordance with the Constitution, it translates to the people respecting the authority of the State, so long as they act within the bounds of the Constitution, and having the constitutionally guaranteed right to vocally call out State authorities for their transgressions.
- **Bring about a positive transformation in the perception of societal or public morality:** The principle of constitutional morality can be used for reading down laws or statutes which are inconsistent with the incumbent time. For instance, in passing a law prohibiting Sati, right to life and dignity was passed on to the Indian widows who were earlier considered to be harbingers of misfortune and ill-luck. However, after the passage of this law, there has been a clear change in the public mindset which also led to the promulgation of more rights to them such as those of remarrying and getting educated post their husband's demise.
- **Promoting diversity, helping to make the society more inclusive:** Constitutional morality is specifically significant for a vibrant and diverse country like India which has got a heterogeneous population with so many further subclassifications: caste, religion, colours, sexual orientation, languages, genders, etc. Since 'plurality' is one of the crucial ethos of the principle of constitutional morality, it recognises this distinction and non-homogeneity and promotes diversity, helping to make the society more inclusive.

## Constitutional Morality and Basic structure

Constitutional morality is the latest in the series of various silences of the Constitution, of which Basic Structure was the first in 1973. The relationship between them can be explained on following lines:

- While, the concept of Basic structure was empathetically discussed at length, in Keshvanada Bharathi case and the **judiciary continues to define its scope and characteristics with new interpretations, no constitutional case has so far provided clear interpretations** regarding the concept of constitutional morality.
- The concept of 'basic structure' is **mostly used to nullify the constitutional amendments** which go against the fundamental spirit of the constitution. Constitutional morality on the other hand has emerged as an alternative jurisprudential concept that can be used to **nullify ordinary legislations** to avoid weakening the sanctity of the 'basic structure' concept.

» **Akin to the basic structure doctrine:** Together with basic structure doctrine, CM is known as one of the 'Constitutional Silences'. Like the basic structure test, it imposes implied constitutional limits on the government and ensures that government's actions do not violate the spirit, soul or conscience of the Constitution.

» **Moving towards achieving Constitutionalism:** The concept of constitutional morality urges the organs of the State to preserve the heterogeneous nature of the society. Thus, it backs the efficacy of Constitutionalism in the true sense.

## Concept of Constitutionalism in India

- In any democratic country like India, **Constitutionalism is the manner in which the institutions of the Government conduct themselves to achieve the very objective of the Constitution.**
- Constitutionalism renders political and ideological aspirations that connote to the philosophical soul of the Constitution with a primary objective **to transform the society progressively and inclusively.**
- It thus not only includes the recognition of the rights and dignity of individuals but also **propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities** to develop socially, economically and politically, thus dissuading the society from indulging in any form of discrimination.

## How the concept of Constitutional Morality evolved?

### ● Conceptual Definition given by George Grote:-

» The concept of constitutional morality was propounded by the British Classicist named George Grote in the 19th century in his book "A History of Greece."

» He described CM as a **"paramount reverence for the forms of the Constitution"** of the land.

- It essentially implied a **"co-existence of freedom and self-imposed restraint"**. It means that while citizens would respect the Constitution and obey Constitutional authorities, they would also have the freedom to criticize those Constitutional authorities, and Constitutional authorities would have to act within the limits imposed by the law.

### ● Ambedkar's perspective on CM:-

» In Indian context, the word Constitutional Morality was first propounded by Dr. B.R.

Ambedkar in November 1948 in parliamentary debate with respect to the details of administration included in the draft constitution.

» Ambedkar, drawing on the work of Grote, formulated his understanding of constitutional morality as an effective coordination between conflicting interest of different people and the administrative cooperation to solve those issues or conflicts amicably without indulging in any major confrontations or resorting to violent revolutions.

» According to him, constitutional morality was the answer to the existing disparity in the society and the doctrine primarily translated to **respect among stakeholders in a republic for Constitutional democracy** as the accepted form of governance and administration.

### ● Constitutional References:-

» The term 'Constitutional Morality' is not found in Indian Constitution. Nevertheless, we find mention of the word "morality" in conjunction with "public order" in the constitution at various places.

- For instance, fundamental rights available under Articles 19(1)(a), 19(1)(c), may be reasonably limited by the State on grounds of "public order, decency or morality" and those under articles 25(1) and 26 are "subject to public order, morality and health".

### ● Post 1950s till present:-



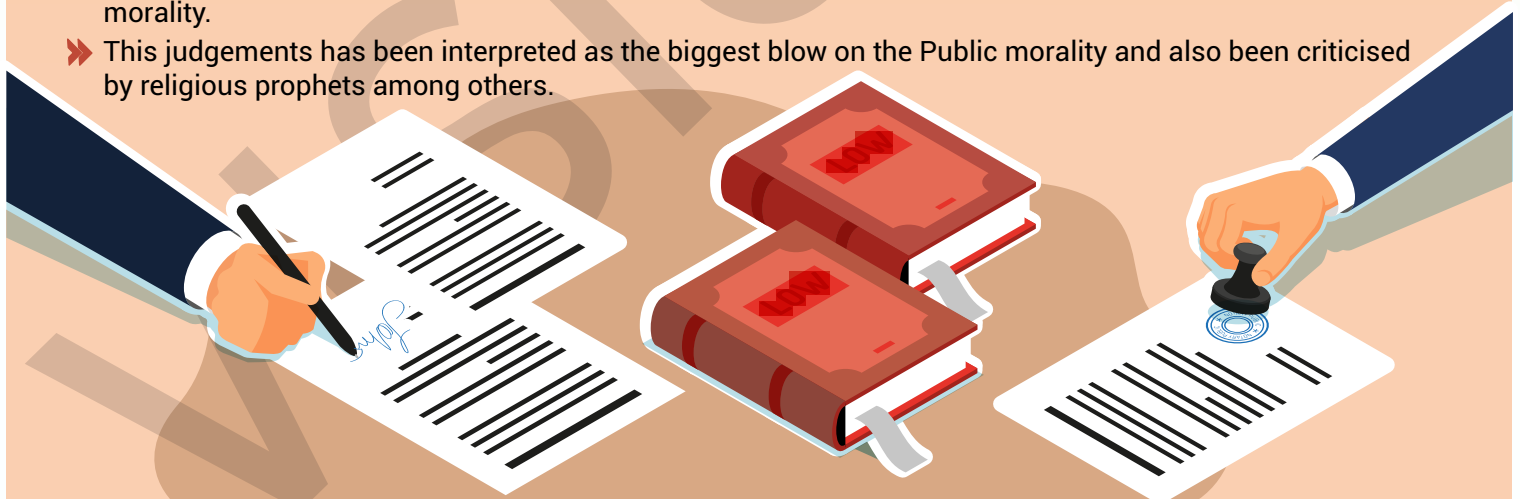




- » Post-1950, the concept lay in a somewhat dormant state. Though, it was used in passing reference twice, by the Supreme Court in the Keshavananda Bharti and First Judges case, a.k.a. S.P. Gupta v. Union of India.
- » It was the first time in 2010, in **Naz Foundation v. Government of NCT of Delhi** when the term was used in an antithetical manner to popular acceptance and standards of morality. In this form, a precedent was set for the courts to disregard societal norms, stigmas and limitations while assessing the actions of the State.
  - For instance, in this case, while deliberating upon the issue of decriminalisation of homosexuality, then a criminal offence under Section 377 of the Indian Penal Code (IPC), the **Court took into cognizance the ideal of upholding the constitutional principles** rather than society's perception with regards to the legitimacy of same-sex relationships.
- » The trend continued, as judges started giving the rationale of constitutional morality in many landmark judgements thereafter. This has led to an understanding in which **constitutional morality essentially means two things in the present era: a counterpoise to popular/social morality and as a reincarnation of the doctrine of basic structure** and thereby evaluating and analysing the soul, conscience or the spirit of the constitution.

## Landmark Judgements that shaped the contemporary interpretations of the doctrine

- **Navtej Singh Johar v Union of India (2018)**: To protect the rights of LGBTQ community, the apex court passed a judgement which partially struck down Section 377 of IPC which made "carnal intercourse against the order of nature" (including Homosexuality) a crime.
  - » Applying the doctrine, the judges found that court must not be remotely guided by majoritarian view or popular perception but they must be guided by constitutional morality.
  - » The courts differentiated between public and constitutional morality and said that the ideal of justice always have an overriding effect .i.e. constitutional morality have an overriding effect on public morality.
- **Joseph Shine v. Union of India (2019)**: Upholding the right of gender equality and right to equality supreme court struck down Section 497 of IPC which made adultery a crime for a man to have sexual intercourse with a married woman, though the married woman was not to be punished as an abettor.
  - » Here it was noted by court that the constitutional validity of criminal laws should not be determined by popular/-public morality which is not in consonance with constitutional morality. The idea of "Husband as master of women" or "a woman as a possession of her spouse" was held to be completely contrary to the spirit of constitution facets and ideals. Here doctrine comes as counterpoise to "Public Morality".
- **Government of NCT of Delhi v. Union of India** : The court was called upon to decide as to what power does the Lt. Governor of Delhi wield in the Indian Constitutional scheme.
  - » In this case, Courts equated constitutional morality to a '**second basic structure doctrine**' and it was observed by the Supreme Court that constitutional morality is "not just the forms and procedures of the Constitution, but provides an enabling framework that allows a society the possibilities of self-renewal".
- **Indian Young lawyers Association v. State of Kerala**: SC held that exclusion between the age of 10-50 in Sabrimala temple for worship of Lord Ayyappan is violative of 4 key constitutional morality tests, which includes: Justice, Liberty, Equality and Fraternity.
  - » In this, Court noted that the word "**morality**" in **Article 25 & 26 must mean constitutional morality and not popular morality** and existing structures of social discrimination must be evaluated through the prism of constitutional morality.
  - » This judgements has been interpreted as the biggest blow on the Public morality and also been criticised by religious prophets among others.



# On what grounds has the doctrine been criticised in India?

- **Lack of literature and clarity on the concept of CM:** As there is no explicit mention of the term 'constitutional morality' in the Constitution of India and no fixed definition that has been attributed to it, it has been left on the discretion of the individual judges to interpret the essence of this doctrine and apply in requisite situations. This makes it **privity to subjective interpretations by individual judges** having different perceptions.
  - » For instance, in Sabarimala case, the majority opinion held the restriction imposed upon women in age group 10-50 years is against CM while one dissenting opinion found that the "Constitutional morality will require that every single individual would have the right to his own faith and nobody can interfere with it, the courts cannot interfere with what is the matter of faith".
- **Encourages judicial supremacy and activism by the courts:** Upholding and promoting democracy by using constitutional morality encourages judicial activism by the courts, leading to interventions in those functions which are to be primarily undertaken by the legislature. This also makes this doctrine **violative of basic tenet of democracy, that is, of separation of power** between judiciary, legislature and the executive.
  - » This becomes possible with Supreme Court's interpretation of Article 142 of the Constitution. The article deals with the power of the top court to exercise jurisdiction and pass orders in the spirit of doing complete justice.
- **Hinders the organic and natural development** of liberalism or rectification of the wrongs or ethical ills of the society as it vests powers in the hands of the courts to implement a 'top-down approach' of the ideal on the morality front. It also indirectly reflects a lack of faith on the true ideals of democracy which is based on the wisdom of the populace that is to be governed.
- **Creates distrust among public towards organs of State:** The top-down imposition of constitutional morality by Court which is an unelected and autonomous body may instill and encourage a general distrust among public towards the Legislature and the Executive.
- **Acts as counterpoise to public morality:** The notion of public morality is essentially based in the societal notion of right or wrong and not based on the core principles of the constitution. As a result, on several occasions the decision based on public morality is at loggerheads with the decision based on constitutionally morality.
  - » Also, the notion of **popular morality is extremely fluid and subjective in nature**. As a consequence, courts have argued that constitutional morality should take precedence over public morality while testing the validity of government actions.



## Public Morality or Constitutional Morality, which is better suited for restricting the Fundamental Rights?

- **Why using the notion of Constitutional Morality over Public Morality can be problematic?**
  - » Under Article 12 of the Constitution, the power to impose reasonable restrictions on Fundamental Rights is vested with the Legislative and Executive and not with the Judiciary. Thus, clearly asserting that **judiciary cannot limit the Fundamental Rights through the doctrine of Constitutional Morality but the same can be done by Executive and Legislature under the notion of Public Morality** stated in Article 12.
  - » Moreover, it is also argued that the **fluidity of public morality is the essence of a society making moral progress through social evolution**. Subsequently, stating that this natural progress should not be overpowered by transformative constitutionalism or constitutional morality acting as top-down doctrines.

- **Why basing decisions solely on Public Morality is ill-advised?**
  - Although idea of Public Morality seems to be democratically more suited for restricting Fundamental Rights, **limiting them solely on the basis of "public morality" is rife with subjectivity** since every dispensation/government may have its own definition of public morality.
- **Can there be a balance?**
  - "Constitutional morality" may be applied by the judiciary to assess State actions **which are substantively unreasonable or violative of the spirit of the Constitution**. This will indirectly address the issue with usage of public morality by **minimizing the possibility of unreasonable decision making while simultaneously providing a space for public morality to naturally evolve**.

## What principles should guide our approach towards constitutional morality in the future?

- **Constitutional morality to be complemented and supplemented by the judicial values:** Constitutional Morality is a sentiment to be cultivated in the minds of a responsible citizen which is to be promoted by an independent judiciary embodied with values and ethics. Where judicial diligence is absent and judicial integrity is questioned, Constitutional Morality cannot be upheld.
- **A standardized yardstick has to be evolved** so that there is no scope for legal inconsistencies. A jurisprudential analysis is the need of the hour when judges will see CM not just as a tool to nullify a particular legislation or executive practice but to establish it in the vocabulary of constitutional law as a philosophical concept having a specific meaning and scope.
- **Need for a balance in application:** Constitutional morality may be invoked on the basis of the provisions of the Constitution to question the conduct of the State and to identify the metes and bounds within which the State must operate. However, it cannot be used to emasculate the discretion and prerogative constitutionally vested in the State to define public morality by virtue of it being an elected body.
- **Commitment to the ideals and aspirations of the Constitution:** The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the Constitutional parameters without paving the path of deviancy and maintain institutional integrity and the requisite Constitutional restraints through their actions.
  - In this direction, awareness must be created among the common public regarding their rights as well as their responsibilities or duties towards the country.



### CONCLUSION

The requirement of certain principles and limitations for application of Constitutional Morality cannot be denied. However, the viewpoint here is not to completely dissolve the aspect of constitutional morality but rather harmoniously construct it in order to better the functioning of the judiciary and the judicial powers embarked upon them. The courts can thus employ Constitutional Morality as an effective tool for interpretations of the rights conferred on the individual by the Constitution.

## Topic at Glance

### Significance of the doctrine

- Safeguards and upholds the enforcement of rule of law in the country.
- Promoting and reinforcing the democratic ideals of the nation.
- Bringing a positive transformation in the perception of societal or public morality.
- Practically acts as an equivalent to the basic structure doctrine.
- A step towards achieving Constitutionalism.



### CONSTITUTIONAL MORALITY

- The concept is **not defined anywhere**, however, there are many different notions on the same.
- It basically means the adherence to the core principles of the constitution in a democracy i.e. a moral obligation of an individual to uphold the constitutional values with utmost dignity.



### Evolution of the concept

#### Conceptual Definition given by George Grote

He described CM as a **"paramount reverence for the forms of the Constitution"** of the land which essentially implied a **"co-existence of freedom and self-imposed restraint."**



#### Ambedkar's perspective on CM

An **effective coordination between conflicting interest of different people and the administrative cooperation to solve those conflicts** amicably without indulging in any major confrontations or resorting to violent revolutions.



#### Post 1950s till present

**Various Landmark Judgements by the courts shaped the contemporary interpretations** of constitutional morality starting with judgement given in Naz Foundation v. Government of NCT of Delhi in 2010.

In the present era, this doctrine essentially means two things : **a counterpoise to popular/social morality and as a reincarnation of the doctrine of basic structure.**



### Criticisms of the doctrine

- Lack of literature and clarity on the concept of Constitutional Morality.
- Encourages judicial supremacy and activism by the courts.
- Hinders the organic and natural development of the society.
- Creates distrust among public towards organs of the State.
- Acts as a counterpoise to public morality.



### Principles that should guide future approach towards constitutional morality

- Constitutional morality to be complemented and supplemented by the judicial values.
- A standardized definition of the concept has to be evolved.
- Need for a balance in application of the doctrine by the Judiciary.
- Commitment to the ideals and aspirations of the Constitution by all stakeholders.